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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

LUIS A. BARBARENA et al.,

Plaintiffs and Appellants,

v.

KEYES AUDI,

Defendant and Respondent.

B202599

(Los Angeles County
Super. Ct. No. BC359775)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Richard L. Fruin, Jr., Judge. Affirmed.

Law Offices of Timothy J. Donahue and Timothy J. Donahue for Plaintiffs and
Appellants.

Herzfeld & Rubin, LLP and Gary S. Yates for Defendant and Respondent.

Plaintiffs and appellants Luis and Heather Barbarena appeal from the grant of summary judgment and dismissal in favor of defendant and respondent Keyes Audi, Inc. (Keyes).¹ They contend they were denied the opportunity to conduct meaningful discovery and their opposition to the motion raised a triable issue of material fact. We disagree and affirm the judgment.

We glean the facts from Keyes's motion for summary judgment.² On December 14, 2005, Luis was driving a 2005 Audi, which stalled on the Ventura Freeway and was rear-ended by an automobile driven by Matthew Salzberg.

On or about October 4, 2006, appellants filed a form complaint naming Salzberg, Keyes, and others as defendants. Appellants sued Keyes for strict liability, negligence, and breach of warranty. According to Keyes, the complaint alleged that the Audi ““was defectively designed, sold, assembled, made, distributed and marketed so as to stall on the freeway causing injury, damage, loss and harm to plaintiffs. [Fn. omitted.]””³

On December 22, 2006, Keyes served Luis with “Special Interrogatories designed to elicit the substance of appellants’ claims and contentions.” Luis was asked if he contended that there was a design or manufacturing defect in the Audi (including whether any of the car’s component parts were negligently designed or manufactured) or that Keyes breached any express or implied warranties with respect to the vehicle. Luis’s answers to the interrogatories relating to the design and manufacturing of the vehicle were substantially the same. He stated that no such contentions had been formulated. He did note on a couple of occasions that the vehicle had not been inspected since the accident. When Luis was asked to identify the vehicle parts that were defective, he answered with a simple, “[n]ot applicable.” When asked to specify what express

¹ For sake of clarity we will refer to each appellant by his or her first name, with no disrespect intended.

² Appellants failed to include a copy of their complaint in the record on appeal.

³ Heather was not in the vehicle at the time of the accident. Her claim was for property damage and loss of consortium. The record provides no further information regarding any of the other defendants.

warranty Keyes breached, Luis repeated that he was not making such a contention because no discovery had been undertaken. Luis was asked to identify the implied warranty Keyes breached, and he responded, “[t]he implied warranty of fitness for a particular purpose. The expectation/implied warranty of a reasonable consumer.” The evidence supporting this contention was that “the vehicle was being driven in a normal manner under normal conditions when it stalled on the freeway.”

On March 27, 2007, Keyes filed for summary judgment, or in the alternative, summary adjudication of issues. Keyes claimed that Luis’s interrogatory responses constituted an admission that appellants’ lawsuit lacked merit, in that he stated he did not contend that: (1) the Audi had a design or manufacturing defect; (2) any component part of the Audi was negligently designed or manufactured; or (3) Keyes breached an express warranty related to the Audi. Keyes argued Luis had failed to identify any implied warranty that applied to the vehicle.

On June 5, 2007, appellants filed their opposition to the motion. Appellants argued that they could not be bound by Luis’s interrogatory responses because they did not have an adequate opportunity to conduct discovery. In their separate statement of undisputed facts, they cited deposition testimony of a Keyes’s employee, who they identified as Mr. Floodquist (his true name is David Flodquist), which purported to establish that on November 17, 2005, Keyes was aware that the Audi was having engine problems and its cylinders were misfiring. Keyes’s employees attempted to conduct a safety inspection; however, they were unable to prevent the engine from stalling. We note that although appellants’ opposition purported to attach Flodquist’s deposition testimony as an exhibit, the testimony is not included in the record on appeal. Appellants also presented Heather’s declaration, in which she stated that the Audi was essentially a new car and contended that the vehicle was “defectively designed, defectively manufactured, negligently designed, negligently manufactured and as a result stalled, resulting in severe injuries to [her] husband.” She set forth no facts in support of her contention.

In its reply to appellants' opposition, Keyes objected to Heather's declaration, arguing that her opinion lacked foundation. It also accused appellants of misrepresenting the substance of David Flodquist's deposition. As examples, Keyes submitted service invoices and Flodquist's declaration to show that: (1) the engine trouble cited by appellants occurred in October 2004, over 14 months prior to the accident; (2) on September 14, 2005, Luis brought the Audi in to have a taillight bulb replaced; and (3) on November 17, 2005, Luis brought in the car for its 25,000 mile recommended service and did not voice any specific complaints with its performance.

At the hearing on the motion on July 3, 2007, appellants complained that they had not completed discovery and had not inspected the vehicle. Nonetheless, they did not request a continuance in their opposition papers or during the hearing. Appellants argued that Luis's interrogatory responses did not constitute admissions. The court noted that appellants had had 75 days within which to file opposition and stated, "You don't seek to amend the discovery [answers]; you don't seek to show by an expert that the stall on the freeway was in some way related to the mechanical condition of the car. How do you expect me not to grant a motion for summary judgment?"

Appellants responded they had presented evidence that the Audi had undergone a safety inspection about three weeks prior to the accident. They claimed to have "tons of circumstantial evidence" establishing why the vehicle stalled. The court pointed out there was no evidence tending to show a connection between the vehicle stalling and Keyes's alleged malfeasance. Appellants responded that the vehicle had been in the dealership a month before the accident and had previously experienced engine problems. They asserted that Luis was driving the Audi under normal conditions when it unexpectedly stalled. Their counsel argued, "Cars don't just stall under those conditions unless there's something wrong with the car. That's a *res ipsa* situation which would shift the burden of proof to the defense to show there was nothing wrong with the vehicle."

The court concluded, "[T]he plaintiffs have never attempted to withdraw their concessions made during discovery, and despite the assertion there's a ton of evidence,

I’ve not heard about it except that a month after a safety check, a vehicle stalled on the freeway.” The court granted summary judgment in favor of Keyes.

DISCUSSION

Initially, appellants complain that the summary judgment motion was heard on July 3, 2007, allegedly three months prior to the discovery cutoff date. While that may have been the case, appellants could have sought a continuance of the hearing for the purpose of conducting additional discovery. (Code Civ. Proc., § 437c, subd. (h).) They did not do so. Thus, they have waived any objection to the trial court ruling on the motion despite their alleged need for further discovery. (See *Lewinter v. Genmar Industries, Inc.* (1994) 26 Cal.App.4th 1214, 1224 [by failing to seek a continuance, party waived objection to trial court hearing summary judgment motion prior to ruling on its motion to compel discovery].)

We turn to appellants’ claim that they presented sufficient evidence to avoid the grant of summary judgment. Generally, a defendant is entitled to summary judgment if it can show that the plaintiff cannot establish one or more elements of each of the causes of action alleged in the complaint. (Code Civ. Proc., § 437c, subd. (o)(1).) In reviewing a grant of summary judgment, we review the record de novo for the existence of triable issues by considering the evidence submitted by the parties, with the exception of evidence to which the trial court sustained an objection. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

In moving for summary judgment, Keyes relied on Luis’s responses to its interrogatories. As set forth above, in answering whether he was contending that Keyes was liable under any of the theories alleged in the form complaint, Luis answered, in essence, that he was not yet making such a contention. Luis argues that the court erred in relying on his alleged admissions because they were not the product of “comprehensive discovery.” We disagree.

To be clear, we are not determining whether Luis's discovery responses were a sufficient basis upon which the court could properly grant summary judgment. The issue is whether Luis's answers shifted the burden of producing evidence to appellants. For some inexplicable reason, Luis not only failed to provide any evidence to support a claim that Keyes had breached any duty owed to appellants, he affirmatively stated that appellants had not yet formulated any theory of liability, contradicting their complaint. Despite these rather startling admissions, he failed to file amended interrogatory answers pursuant to Code of Civil Procedure section 2030.310, subdivision (a). Although appellants complain that discovery had not been completed, they chose to file a form complaint that, according to Keyes, was virtually devoid of facts. They set forth their allegations of liability and little else. Keyes filed comprehensive interrogatories seeking to ascertain appellants' contentions and the evidence supporting them. We conclude that Luis's responses, which conceded appellants had not yet formulated a theory of liability and offered no evidence tending to show Keyes had breached any duty to them, were sufficient to shift the burden of production to appellants. (See *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 106-107; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 580-581.)

Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal.App.4th 64, cited by appellants, is distinguishable. In that case, the plaintiff sued a number of defendants, alleging they were responsible for his having contracted asbestosis. Dinwiddie sought summary judgment, citing the plaintiff's failure to identify in his deposition any work location where Dinwiddie had been the general contractor. (*Id.* at p. 67.) The trial court granted summary judgment in favor of Dinwiddie. The appellate court reversed, finding that the plaintiff had never been asked whether he had any evidence linking Dinwiddie to any of his work sites. Thus, the court determined that the plaintiff's deposition answers failed to establish that he had no evidence to support his allegations against Dinwiddie. (*Id.* at p. 81.) Here, Luis was asked specifically to identify his contentions of liability and to cite the evidence in support of his claims. He could not do so.

Nor are we persuaded by the fact that Heather was not given the opportunity to respond to the same interrogatories Keyes served on Luis. Luis, as the driver of the vehicle, was the person most knowledgeable with respect to the accident. As Keyes points out, Heather has no direct claim against it with respect to the design and repair of the Audi.

Having concluded that the burden of producing evidence properly shifted to appellants, we examine their factual showing in the trial court. As discussed, they chose to rely on excerpts of David Flodquist's deposition. Although appellants attempted to establish that the Audi had specific engine problems addressed on November 17, 2005, some four weeks before the accident, Keyes produced evidence that appellants had misrepresented Flodquist's testimony. Keyes presented Flodquist's declaration and service records to show that the engine work in question was performed in October 2004, approximately 14 months before the accident. Appellants did not dispute this during the hearing on the motion. Nor did they contest Keyes's contention that the implied warranty of fitness for a particular purpose did not apply and the so-called implied warranty of the reasonable consumer did not exist. Thus, appellants were left with two facts tending to show Keyes was negligent: (1) on November 17, Keyes performed the recommended 25,000 mile service on the Audi; and (2) it stalled on the freeway on December 14.

Appellants contend that the trial court should have relied on the doctrine of *res ipsa loquitur* and denied Keyes's motion.⁴ We disagree. "*Res ipsa loquitur* is a doctrine affecting the burden of producing evidence applicable to certain kinds of accidents that are so likely to have been caused by a defendant's negligence that, in the Latin equivalent, "the thing speaks for itself." [Citation.] If applicable, the doctrine of *res ipsa loquitur* establishes a presumption of negligence requiring the defendant to come

⁴ As the "doctrine of *res ipsa loquitur* relates to cases involving negligence and has no application to an alleged breach of warranty" (*Trust v. Arden Farms Co.* (1958) 50 Cal.2d 217, 223), appellants have forfeited any claim that they presented sufficient evidence to justify a denial of the summary judgment motion on their warranty claims.

forward with evidence to disprove it. [Citations.]” (*Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1389.)

Three conditions must be satisfied before the presumption arises: (1) the accident must be of a type which would not ordinarily occur absent someone’s negligence; (2) the accident must have been caused by an instrumentality within the defendant’s exclusive control; and (3) the accident must not have been due to any voluntary action or contribution by the plaintiff. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825-826.)

We start with the first condition. Was the accident that occurred of a type which would not ordinarily occur in the absence of negligence? In answering this question, we “may consider common knowledge, the testimony of expert witnesses, and the circumstances relating to the particular accident at issue. [Citation.] It need not be concluded that negligence is the only explanation of the accident, but merely the most probable one.” (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 359-360.)

Appellants claim that the vehicle in question would not have stalled absent Keyes’s negligence. They have not cited a case that holds *res ipsa loquitur* applies when an automobile stalls on the highway, and our research has not disclosed the existence of any such authority. Appellants did not present expert testimony suggesting that a vehicle generally does not stall absent the negligence of the individuals responsible for servicing it. We cannot say, under the circumstances of our case, that negligence probably led to the vehicle suddenly stopping on the freeway. The parties conceded the vehicle had been driven over 25,000 miles, and we find no connection between the November service and the vehicle’s failure in December. (Compare *Ghera v. Ford Motor Co.* (1966) 246 Cal.App.2d 639 [presumption applied where new vehicle that had been driven about 1,600 miles developed a fire in the engine compartment]; *Dunn v. Vogel Chevrolet Co.* (1959) 168 Cal.App.2d 117 [presumption applied where plaintiff went to dealer to have brakes repaired, retrieved repaired vehicle, and, on the same day, brakes failed causing

accident].) Given the facts in this case, the trial court properly declined to apply the doctrine of *res ipsa loquitur*.⁵

We conclude appellants failed to raise a triable issue of material fact as to any of their theories of liability. The grant of summary judgment was appropriate.

DISPOSITION

The grant of summary judgment (the order of dismissal) is affirmed. Keyes is to recover its costs on appeal.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

MANELLA, J.

⁵ As we conclude that appellants failed to satisfy the first condition necessary to apply the presumption, we need not address the matter further.